

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

LANITA WASHINGTON,

PLAINTIFF

V.

NO. 2:98cv76-B-B

FITZGERALDS SOUTH, INC., ET AL.,

DEFENDANTS

Memorandum Opinion

This cause comes before the court on the plaintiff's motion to remand. The court has duly considered the parties' memoranda and is ready to rule.

The defendants removed this cause on the ground of federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441(a). The notice of removal alleges that the plaintiff's state law claims for damages under an employee welfare plan are completely preempted by the Employee Retirement Income Security Act of 1974 [ERISA] and therefore arise under federal law. The complaint alleges bad faith denial of medical benefits, failure to properly investigate and fraudulent inducement and seeks, *inter alia*, payment of the plaintiff's medical benefits and punitive damages.

The plaintiff does not dispute that the subject plan is governed by ERISA and refers to her claims as ERISA claims. It is well settled that ERISA's civil enforcement provisions, 29 U.S.C. § 1132(a), displace and, thus, completely preempt the plaintiff's state common law claims. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 66-67, 95 L. Ed. 2d 55, 65 (1987) (causes of action within ERISA's civil enforcement provisions are necessarily federal in character and therefore arise under federal law); Brown v. Southwestern Bell Tel. Co., 901 F.2d 1250, 1254 (5th Cir. 1990). Clearly, the complaint seeks "to recover benefits due to [the plaintiff] under the terms of [the

ERISA] plan” within the scope of section 1132 (a) (1) (B).

The plaintiff does not challenge the court’s subject matter jurisdiction. “ERISA grants federal courts jurisdiction of actions brought to recover benefits or enforce rights under the terms of an ERISA plan.” Hansen v. Continental Ins. Co., 940 F.2d 971, 978 (5th Cir. 1991).¹ See 29 U.S.C. § 1132 (f).² The plaintiff moves to remand on the ground of the state court’s concurrent jurisdiction, coupled with the plaintiff’s right to choose a forum. The plaintiff, as the master of her complaint,³ has the right to bring an action in state court. However, the plaintiff’s right to choose a forum has no bearing on the defendants’ statutory right to remove this action to federal court. 28 U.S.C. § 1441 (a) authorizes the removal of “any civil action brought in a State court of which the district courts of the United States have **original** jurisdiction.” (Emphasis added). Since “[o]riginal jurisdiction does not mean exclusive jurisdiction...the existence of concurrent state and federal jurisdiction does not operate to defeat defendant’s right of removal to federal court.” Leonardis v. Local 282 Pension Trust Fund, 391 F. Supp. 554, 557 (E.D. N.Y. 1975), cited in In re Marriage of Thompson, 450 F. Supp. 197, 199 (W.D. Tex. 1978) (action to clarify rights to future ERISA benefits would have been removable pursuant to the federal court’s

¹The court in Hansen cites 29 U.S.C. § 1132 (e). Section 1132 (e) (1) provides that state courts and district courts shall have concurrent jurisdiction of actions under section 1132 (a) (1) (B).

²29 U.S.C. § 1132 (f) provides:

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

³Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 96 L. Ed. 2d 318, 327 (1987).

concurrent jurisdiction under 29 U.S.C. § 1132 (e) (1) “were it brought by itself in state court”⁴). Therefore, the court finds that this cause was properly removed. See Hansen, 940 F.2d at 978 (since the subject plan “was an employee welfare benefit plan within the meaning of ERISA...[the action for plan benefits in excess of the amount tendered by the insurers] was properly removed to federal court”).⁵

THIS, the ____ day of November, 1998.

NEAL B. BIGGERS, JR.
CHIEF JUDGE

⁴In In re Marriage of Thompson, the ERISA claims were joined in a divorce action. 450 F. Supp. 197, 198 (W.D. Tex. 1978).

⁵The defendants request an award of reasonable attorneys’ fees, costs and expenses incurred in contesting the instant motion. 28 U.S.C. § 1447 (c) provides that “[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, **incurred as a result of the removal.**” (Emphasis added). The removal statutes do not authorize an award to a removing defendant and the defendants neither cited Rule 11 of the Federal Rules of Civil Procedure nor complied with the procedure prescribed by Rule 11(c) (1)(A).